

MAY 01 2019

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BY: [Signature] Deputy Clerk

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15 ECOLOGICAL RIGHTS FOUNDATION

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF SAN FRANCISCO

18 ECOLOGICAL RIGHTS FOUNDATION,
19 Plaintiff,
20 v.
21 BULL OUTDOOR PRODUCTS, INC., et al.,
22 Defendants.

Case No. CGC-18-564503

[Signature]
[PROPOSED] CONSENT JUDGMENT
AS TO THE ALLEN COMPANY, INC.

23 **1. INTRODUCTION**

24 1.1 On February 21, 2018, the Ecological Rights Foundation (“ERF”) acting on behalf
25 of itself and the general public, filed a Complaint for Injunctive Relief and Civil Penalties
26 (“Complaint”) in San Francisco Superior Court, Case No. CGC-18-564503 against defendant
27 The Allen Company, Inc., (also referred to herein as “The Allen Company” or “Defendant”).
28 The Complaint alleges, among other things, that Defendant violated provisions of the Safe
Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5,
et seq. (Proposition 65) by failing to give clear and reasonable warnings about carbon monoxide
exposures to those residents of California who use charcoal starters that are manufactured,
distributed or sold by Defendant (“Covered Products”), that use of those products causes
exposures to carbon monoxide, a chemical known to the State of California to cause birth defects

1 and other reproductive harm. The Complaint was based upon a 60-Day Notice letter, sent by
2 ERF on July 3, 2017, to The Allen Company, the California Attorney General, all District
3 Attorneys, and all City Attorneys with populations exceeding 750,000 (the "60-Day Notice").

4 1.2 Defendant is a company that employs more than ten persons, and manufactures,
5 distributes, and/or sells Covered Products. ERF alleges that the Covered Products that Defendant
6 distributes, markets and sells are designed to assist the ignition and combustion of charcoal,
7 which creates carbon monoxide to be released into the air, causing inhalation exposures to those
8 using or standing near the Covered Products when they are in use. Pursuant to Health and Safety
9 Code Section 25249.8, carbon monoxide is a chemical known to the State of California to cause
10 reproductive toxicity. ERF alleges that Covered Products that are manufactured, distributed or
11 sold by Defendant for use in California require a warning under Proposition 65, pursuant to
12 Health and Safety Code Section 25249.6.

13 1.3 ERF and The Allen Company are hereafter sometimes referred to individually as a
14 "Party" or collectively as the "Parties."

15 1.4 For purposes of this Consent Judgment, the parties stipulate that this Court has
16 jurisdiction over the allegations of violations contained in the Complaint and personal
17 jurisdiction over The Allen Company, that venue is proper in the County of San Francisco, and
18 that this Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution
19 of the allegations contained in the Complaint.

20 1.5 This Consent Judgment resolves claims that are denied and disputed. The parties
21 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
22 between the parties for the purpose of avoiding prolonged litigation. Nothing in this Consent
23 Judgment, nor compliance with its terms, shall constitute an admission by any of the Parties, or
24 by any of their respective officers, directors, shareholders, employees, agents, parent companies,
25 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers, or
26 retailers, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or
27 liability, including without limitation, any admission concerning any alleged violation of
28 Proposition 65 or any other material allegation of the Complaint, each and every allegation of

1 which The Allen Company denies, nor may this Consent Judgment, or compliance with it, be
2 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of The Allen
3 Company.

4 1.6 The term "Effective Date" means the date that Defendant receives Notice that this
5 Consent Judgment was entered by the Court.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Warnings on Covered Products**

8 No later than 120 days after the Effective Date, Covered Products offered for sale in
9 California shall include one of the following warning statements:

10 **WARNING:** This product can expose you to chemicals including Carbon Monoxide and
11 Lead which are known to the State of California to cause cancer and birth defects or other
12 reproductive harm. For more information, go to: www.P65Warnings.ca.gov

13 Or,

14 **WARNING:** This product can expose you to carbon monoxide, which is a combustion
15 byproduct known to the State of California to cause birth defects or other reproductive
16 harm. For more information go to www.P65Warnings.ca.gov.

17 Or,

18 **WARNING:** This product can expose you to chemicals including combustion by-
19 products (including soot and carbon monoxide), which are known to the State of
20 California to cause birth defects or other reproductive harm. For more information go to
21 www.P65Warnings.ca.gov.

22 Or, any warning subsequently established by statute, regulation, or court decision in a
23 contested matter, that is directly applicable to the same type of product as the Covered
24 Products, and the purpose of which is or includes satisfying Proposition 65 warning
25 requirements.

26 The warning statement shall be affixed to, or printed on packaging for, Covered Products, or
27 provided in a manner established by statute or regulation applicable to the same type of product
28 as the Covered Products. In accordance with the current regulations, the warning shall be

1 displayed with such conspicuousness, as compared with other words, statements, designs, or
2 devices as to render it likely to be read and understood by an ordinary individual under
3 customary conditions of purchase or use. The type size of the warning must be legible, and no
4 smaller than any other warning provided on or with the Covered Products. The word
5 "WARNING:" shall be in upper case letters and bold text. Defendant may utilize a symbol
6 consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline,
7 or a black exclamation point in a white triangle with black border if no yellow is used in the
8 section of the packaging, print or online material regarding the Covered Products that contains
9 other warning language regarding use of the Covered Products.

10 2.2 Exemption.

11 All Covered Products that have been or will have been distributed, shipped, or sold, or
12 otherwise placed in the stream of commerce through and including the Effective Date of this
13 Consent Judgment are exempt from the provisions of Section 2.1 and are included in the release
14 in Section 4.1.

15 2.3 Reporting

16 No later than 150 days after the Effective Date, Defendant shall provide a certification
17 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
18 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

19 3. SETTLEMENT PAYMENTS

20 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all claims
21 contained in or referred to in the 60-Day Notice, Complaint, and this Consent Judgment, The
22 Allen Company shall make payments totaling \$18,000.00 (eighteen thousand dollars) within ten
23 days of the Effective Date, as more specifically set forth in sections 3.1 and 3.2, below, which
24 shall be in full and final satisfaction of any and all civil penalties and attorneys' fees and costs
25 owed to ERF, OEHHA, and/or its counsel.

26 3.1 Civil Penalties and Payments In Lieu of Penalties

27 Pursuant to Health and Safety Code section 25249.7(b)(2), The Allen Company shall pay
28 \$1,000.00 (one thousand dollars) in civil penalties. The penalty payment will be allocated in

1 accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of
2 the penalty amount remitted to the California Office of Environmental Health Hazard
3 Assessment ("OEHHA") and the remaining 25% of the penalty amount paid to Ecological Rights
4 Foundation. Defendant will provide these payments in two checks for the following amounts
5 made payable to: 1) "OEHHA" in the amount of \$750.00, and 2) "Ecological Rights Foundation"
6 in the amount of \$250.00.

7 3.2 Attorneys' Fees and Litigation Costs

8 In settlement of all of the claims that are alleged, or could have been alleged, in the
9 Complaint concerning Covered Products, The Allen Company shall pay \$17,000 (seventeen
10 thousand dollars) to the Ecology Law Center to cover Plaintiff's attorneys' fees and costs.

11 3.3 Payments

12 All Payments shall be sent no later than 10 days after the Effective Date via USPS
13 certified mail, return receipt requested, to the following addresses:

14 All payments to Ecological Rights Foundation and Ecology Law Center shall be delivered to:

15 Fredric Evenson
16 Ecology Law Center
17 P.O. Box 1000
18 Santa Cruz, CA 95061

19 The payment to OEHHA shall be delivered to:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
23 P.O. Box 4010
24 Sacramento, CA 95812-4010

25 4. RELEASE OF CLAIMS.

26 4.1 As to Covered Products, this Consent Judgment is a final and binding resolution
27 between ERF, acting on behalf of itself and, as to those matters raised in the 60-Day Notice,
28 acting in the public interest. ERF, acting on its own behalf and in the public interest, forever
releases and discharges The Allen Company and its past and present officers, directors, owners,
shareholders, employees, agents, attorneys, parent companies, subsidiaries, divisions, affiliates,
suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers, and all other

1 upstream and downstream entities and persons in the distribution chain of any Covered Product,
2 and the predecessors, successors and assigns of any of them (collectively the "Released
3 Persons"), from any and all claims and causes of action for (i) any violation of Proposition 65
4 (including but not limited to the claims made in the Complaint) based on exposure to carbon
5 monoxide from the Covered Products or failure to provide clear and reasonable warnings in
6 connection therewith; and/or (ii) any other statutory or common law claim based on failure to
7 provide clear and reasonable warnings for exposure to carbon monoxide from the Covered
8 Products, to the fullest extent that any of the foregoing described in (i) or (ii) were or could have
9 been asserted by any person or entity up to and including the Effective Date, against The Allen
10 Company or the other Released Persons. As to actual or alleged exposures to carbon monoxide
11 from Covered Products, compliance with the terms of this Consent Judgment resolves any issue,
12 now and in the future, concerning compliance by The Allen Company and the Released Persons,
13 with the requirements of Proposition 65 with respect to Covered Products, and any actual or
14 alleged resulting exposure.

15 4.2 Compliance with the terms of this Consent Judgment constitutes compliance
16 now and in the future by The Allen Company and the Released Persons with Proposition 65
17 regarding any actual or alleged exposures to carbon monoxide from the Covered Products as set
18 forth in the 60-Day Notice and the Complaint. This Consent Judgment shall apply to and shall
19 benefit The Allen Company and all Released Persons.

20 4.3 It is possible that other claims not known to the Parties, arising out of the facts
21 alleged in the 60-Day Notice or the Complaint and relating to the Covered Product, will
22 develop or be discovered. ERF on behalf of itself only, and The Allen Company on behalf of
23 itself only, acknowledge that this Consent Judgment is expressly intended to cover and include
24 all such claims up through and including the Effective Date, including all rights of action
25 therefor. ERF and The Allen Company acknowledge that the claims released above may
26 include unknown claims, and nevertheless they each waive California Civil Code Section 1542
27 as to any such unknown claims. California Civil Code Section 1542 reads as follows:
28

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
3 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
4 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
5 OR HER SETTLEMENT WITH THE DEBTOR.

6 ERF on behalf of itself only, and The Allen Company on behalf of itself only, acknowledge and
7 understand the significance and consequences of this specific waiver of California Civil Code
8 Section 1542.

9 **5. ENTRY OF CONSENT JUDGMENT**

10 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
11 Upon entry of the Consent Judgment, The Allen Company and ERF waive their respective rights
12 to a hearing or trial on the allegations of the Complaint.

13 **6. ENFORCEMENT OF JUDGMENT**

14 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
15 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
16 San Francisco County, giving the notice required by law, enforce the terms and conditions
17 contained herein.

18 6.2 Before filing a motion or order to show cause under Section 6.1, ERF shall provide
19 The Allen Company with at least thirty (30) days written notice of any alleged violations of the
20 terms and conditions contained in this Consent Judgment, and the parties shall meet and confer
21 in good faith in an effort to resolve any such alleged violation.

22 6.3 In any proceeding brought by either party to enforce this Consent Judgment, such
23 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
24 violation of Proposition 65 or this Consent Judgment.

25 **7. MODIFICATION OF JUDGMENT**

26 7.1 This Consent Judgment may be modified only upon written agreement of the parties
27 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any
28 party as provided by law and upon entry of a modified Consent Judgment by the Court. If either
Party requests or initiates a modification, then it shall meet and confer with the other Party in
good faith before filing a motion with the Court seeking to modify it.

1 **8. TERMINATION AND RETENTION OF JURISDICTION**

2 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
3 terms this Consent Judgment.

4 **9. AUTHORITY TO STIPULATE**

5 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
7 of the party represented and legally to bind that party.

8 **10. SERVICE ON THE ATTORNEY GENERAL**

9 10.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the
10 California Attorney General on behalf of the parties so that the Attorney General may review this
11 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
12 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
13 and in the absence of any written objection by the Attorney General to the terms of this Consent
14 Judgment, the parties may then submit it to the Court for approval.

15 **11. ENTIRE AGREEMENT**

16 11.1 This Consent Judgment contains the sole and entire agreement and understanding of
17 the parties with respect to the entire subject matter hereof and any and all prior discussions,
18 negotiations, commitments and understandings related hereto. No representations, oral or
19 otherwise, express or implied, other than those contained herein have been made by any party
20 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
21 deemed to exist or to bind any of the parties.

22 **12. GOVERNING LAW**

23 12.1 The validity, construction and performance of this Consent Judgment shall be
24 governed by the laws of the State of California, without reference to any conflicts of law
25 provisions of California law.

1 **13. EXECUTION AND COUNTERPARTS**

2 13.1 This Consent Judgment may be executed in counterparts which taken together shall
3 be deemed to constitute one document. A facsimile or .pdf signature shall be construed as valid
4 and as the original signature.

5 **14. COURT APPROVAL**

6 14.1 Upon execution of this Consent Judgment by the Parties, ERF shall notice a Motion
7 for Court Approval.

8 14.2 If the California Attorney General objects to any term in this Consent Judgment, the
9 Parties shall use their reasonable and diligent best efforts to resolve the concern in a timely
10 manner, and if possible prior to the hearing on the motion.

11 14.3 If this Consent Judgment is not approved by the Court, it shall be of no force or
12 effect, and cannot be used in any proceeding for any purpose.

13 **15. NOTICES**

14 15.1 Any notices or payments due under this Consent Judgment shall be sent by USPS
15 certified mail, return receipt requested.

16
17 If to Ecological Rights Foundation: Fredric Evenson
18 Ecology Law Center
19 P.O. Box 1000
Santa Cruz, CA 95061

20 If to The Allen Company Group: Caitlin C. Blanche, Esq.
21 Damon M. Pitt, Esq.
22 K&L Gates LLP
23 1 Park Plaza
24 Twelfth Floor
25 Irvine, CA 92614
26
27
28

1 IT IS SO STIPULATED:

2 DATED: 1/21/19

3 ECOLOGICAL RIGHTS FOUNDATION

4 *Ecological Rights Foundation*

5 BY: *James Lampert*, EXEC. DIR.
6 JAMES LAMPART, EXECUTIVE DIRECTOR

7
8 DATED: _____

THE ALLEN COMPANY, INC.

9 BY: *Gregory Curran*

10 ITS: *President*

11
12 IT IS SO ORDERED, ADJUDGED AND DECREED:

13
14 DATED: *May 1, 2019*

15 *Ethan P. Schulman*

16 JUDGE OF THE SUPERIOR COURT

17
18
19 **ETHAN P. SCHULMAN**